



## FAIR POLITICAL PRACTICES COMMISSION

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April 28, 2009

Selma Mann  
City of Anaheim  
Office of the City Attorney  
200 S. Anaheim Boulevard  
Anaheim, California 90 2805

**Re: Your Request for Advice  
Our File No. A-09-100**

Dear Ms. Mann:

This letter responds to your request for advice on behalf of Anaheim City Council member Lucille Kring regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")<sup>1</sup> and is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Nothing in this letter should be construed to evaluate any conduct that has already taken place.

Additionally, our advice is limited to obligations arising under the Act. We do not address the applicability, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

### QUESTIONS

1. Is the amount to be considered in determining whether a person meets the threshold as a source of income (as set forth in Regulation 18703.3(a)(1)) for purposes of the Act's conflict-of-interest rules the gross payment made for the event in question or the net amount received after the expenses for the event have been paid?
2. For purposes of the Act's conflict-of-interest rules, what pro-rata share, if any, of the amount paid to a business partially owned by a public official is attributable as income to each partner in the business?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

3. May Councilmember Kring participate in the decisions of the Anaheim City Council concerning an appeal of the Zoning Administrator's decision to be heard on April 28, 2009?

### CONCLUSIONS

1. The gross payment received.
2. The pro-rata share of the gross income attributable to each partner is determined by the percentage of the business owned by each partner. A 50-percent partner has a 50-percent pro-rata share in the gross income.
3. No. Councilmember Kring has a conflict of interest due to her economic interest in Dr. Knohl as a source of income to her.

### FACTS

The City of Anaheim (the "City") is a charter city composed of approximately 50 square miles and located in northern Orange County. It has a current population of approximately 346,823, based on May 2008 California Department of Finance numbers. Also, based upon California Department of Finance numbers and residential permit completions and demolitions, the approximate number of households in Anaheim is 99,299, and the number of housing units is 102,117. There are approximately 2,857 retail businesses licensed within the City.

Councilmember Lucille Kring was first elected to the Anaheim City Council (the "Council") in November 1998 and served one four-year term, which expired in November 2002. She was not a member of the city council between November 2002 and November 2006. She was again elected for a four-year term to the Council in November 2006 and currently serves in that position.

Councilmember Kring and her husband own and operate a wine bar known as "Pop the Cork, LLC" (the "Wine Bar"). Councilmember Kring and her husband each have a 50 percent interest in the Wine Bar. The Wine Bar is located in the Garden Walk project within the Disneyland Resort Specific Plan area of the City. Councilmember Kring's records for the Wine Bar do not provide the number of retail customers in the last 12 months.

The Anaheim Resort is the only area of the City designated by the General Plan for commercial/recreational land uses. The General Plan use designation is implemented by three specific plans: the Disneyland Resort Specific Plan, the Anaheim Resort Specific Plan, and the Hotel Circle Specific Plan. The Disneyland Resort Specific Plan applies to 490 acres within the Anaheim Resort and includes the Disneyland theme parks and Downtown Disney.

The Anaheim Garden Walk project is an approximately 29.1 acre mixed use project located between Katella Avenue, Harbor Boulevard, Disney Way, and Clementine Street. The full Garden Walk project at build-out will encompass up to 569,750 square feet of specialty retail, restaurants, entertainment venues including movie theaters, 1,628 hotels rooms (including up to 500 vacation ownership units), 278,827 square feet of hotel accessory uses, a transportation center, and 4800 off-street parking spaces. The Anaheim Garden Walk project is being built in multiple phases. The retail, restaurant, and entertainment use of the project, which includes approximately 439,600 square feet and is part of the first phase, has been completed. Approximately 55 of the stores and restaurants are now open, including the Wine Bar.

On February 7, 2009, Dr. Howard Knohl hosted an event at the Wine Bar for 25 people. Councilmember Kring was informed that Dr. Knohl collected \$40.00 per person for each attendee, for a total of \$1,000. The event was catered by McCormick & Schmidt. The Wine Bar has a contract with the restaurant whereby the restaurant will cater events at the Wine Bar, and a percentage of the total cost of the event is retained by the Wine Bar. The Wine Bar clients pay Pop the Cork for the cost of the event, which then pays McCormick & Schmidt pursuant to the contract for the cost of the catering.

There were two separate orders for Dr. Knohl's event. Order number 9545 for the wine, tax, and tip was in the amount of \$717.40, and was paid with Dr. Knohl's credit card. Order number 9547 for the food, tax, and tip in the amount of \$1,100.31 was paid for with Linda Knohl's (Dr. Knohl's wife) credit card. Both orders were paid on February 7, 2009, and different card numbers were used. The Wine Bar then paid \$1,100.31 to McCormick & Schmidt for the food.

On April 28, 2009, the Council will be considering an appeal filed by Dr. Knohl relating to the zoning administrator's denial of Variance number 2008-04759 for a waiver of fence height requirements concerning an existing fence on Dr. Knohl's residence. On December 11, 2008, the zoning administrator denied the variance. Dr. Knohl filed a timely appeal to the Council. The matter was set for hearing on February 24, 2009, and thereafter continued at Dr. Knohl's request to April 28, 2009.

As a member of the Council, Councilmember Kring will be called upon to participate in the governmental decision concerning the appeal of the variance unless determined that she will have a prohibited conflict of interest as a result of the payment received from Dr. Knohl.

#### **ANALYSIS POTENTIAL CONFLICT OF INTEREST**

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).)

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

**STEPS 1 & 2: IS COUNCILMEMBER KRING A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?**

As a member of the Anaheim City Council, Councilmember Kring is a public official under the Act. (Section 82048.) Consequently, she may not make, participate in making, or otherwise use her official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of her economic interests. Councilmember Kring will be called upon to consider an appeal of a denial of a request for a zoning variance. Therefore, she will be making, participating in making, or otherwise using his official position to influence a governmental decision.

**STEP 3: DOES COUNCILMEMBER KRING HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?**

A public official has a financial interest in a decision within the meaning of section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

- An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Section 82005 defines "business entity" as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association."

Councilmember Kring is a fifty-percent partner, with her husband, in the Wine Bar. We assume her (and his) investment is \$2,000 or more. Accordingly, Councilmember Kring has an economic interest in the Wine Bar as a business entity, from both her direct investment and her indirect investment through her husband as well as from each of their ownership interests. (Section 87103.)

Additionally, Councilmember Kring has an economic interest in the Wine Bar as a source of income, directly to her and indirectly through her husband.<sup>2</sup>

Finally, because Councilmember Kring has a interest in the Wine Bar of 10-percent or greater, she has an economic interest in any individual who is a source of income to the business if her pro rata share of the income aggregates to \$500 or more within 12 months prior to the decision. Furthermore, because her spouse also has an interest in the Wine Bar of 10-percent or greater, she has a pro rata share in that interest also.<sup>3</sup>

You have not provided any facts that indicate any other potential economic interests. Furthermore, by the nature of this question, the governmental decision could not possibly reasonably foreseeably and materially affect any of the economic interests outlined above with the exception of the possible economic interest in Dr. Knohl, or his wife, as a source of income. Thus, our analysis is limited to the economic interest Councilmember Kring has in this potential source of income. In order to analyze this issue, we must first determine if Dr. Knohl is a source-of-income economic interest to Councilmember Kring.

Income is defined as "a payment received." Income of an individual includes "a pro rata share of any income of any business entity . . . in which the individual or spouse owns, directly, indirectly, or beneficially, a 10-percent interest or greater." Income also

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<sup>2</sup> Section 82030(a) provides that income includes "any community property interest in the income of a spouse."

<sup>3</sup> Section 82030(a) defines income of an individual to include "a pro rata share of any income of a business entity . . . in which the individual or spouse owns, directly, indirectly, or beneficially, a 10-percent interest or greater."

includes "any community property interest in the income of a spouse." (Section 82030.) The Wine Bar received two payments, which are considered income. The first payment, for the wine in the amount of \$717.40, was paid by Dr. Knohl. The second payment, for the food in the amount of \$1,100.31, was paid for by Linda Knohl.

Even though the second payment was to cover food supplied by McCormick & Schmidt and that amount was then paid by the Wine Bar to McCormick & Schmidt to cover the charges, because the Wine Bar had a contract with McCormick & Schmidt for the catering services, and the payment for those services was made through the Wine Bar, both payments are considered income to the Wine Bar. Therefore, both Dr. Knohl and Linda Knohl are sources of income to the Wine Bar because each made a payment for at least \$500. Additionally, because Councilmember Kring and her husband each own 50-percent of the Wine Bar, they each have a 50-percent pro-rata share in the income received from customers of the wine bar.

Because the definition of income includes 50-percent of the community property income of her spouse, Councilmember Kring has her 50-percent interest in the income provided to the Wine Bar from Dr. Knohl and Linda Knohl and a one-half interest in her husband's pro-rata share of that income. Therefore, Councilmember Kring has a source of income economic interest in Dr. Knohl  $((50\% \times \$717.40) + (25\% \times \$717.40) = \$538.05)$  and in Linda Knohl  $((50\% \times \$1,100.31) + (25\% \times \$1,100.31) = \$825.23)$ . (*Churchwell* Advice Letter, No. A-06-034; *Seto* Advice Letter, No. A-01-217; *Romney* Advice Letter, No. A-99-263; *King* Advice Letter, No. I-99-145; *Bloom-Rudibaugh* Advice Letter, No. A-94-399.)

#### **STEP 4: IS THE ECONOMIC INTEREST DIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?**

"In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision." (Regulation 18704(a).) For economic interests in sources of income, Regulation 18704.1 determines the applicable material standard. (Regulation 18704(a)(1).)

Regulation 18704.1(a) states:

"(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

"(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

"(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A

person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Dr. Knohl is directly involved in the proceeding because he is the named party in the proceeding. Linda Knohl is also directly involved in the proceeding because she is (assuming the property is community property) the subject of the proceeding in that it involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, her as the owner of the real property.

#### **STEP 5: MATERIALITY STANDARD**

A conflict of interest arises only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).)

For a source of income that is directly involved in the governmental decision any reasonably foreseeable financial effect on that person is deemed material. (Regulation 18705.3(a).) Accordingly, the financial effect of the governmental decision involving the waiver of fence height requirements concerning an existing fence on Dr. Khohl's residence is material.

#### **STEP 6: REASONABLY FORESEEABLE**

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the facts surrounding the decision. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Because your facts indicate that the governmental decision would provide a direct benefit to Dr. Knohl, the financial effect of that decision is reasonably foreseeable.

#### **STEPS 7 AND 8: PUBLIC GENERALLY AND LEGALLY REQUIRED PARTICIPATION**

You have not presented any facts indicating that either the “public generally” or the “legally required participation” exception would be applicable here. Accordingly, we have not provided an analysis involving these steps.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin  
General Counsel

A handwritten signature in black ink, appearing to read "William J. Lenkeit". The signature is stylized with large, flowing letters and a prominent flourish at the end.

By: William J. Lenkeit  
Senior Counsel, Legal Division

WJL:jgl